No. 12120

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS and MRS. MABLE L. PRICE,

Appellants,

vs.

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT and RALPH BAKER,

Appellees.

Appeal from the United States District Court for the Southern District of California Central Division

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BRIEF FOR APPELLANTS.

A. L. WIRIN,
FRED OKRAND,
ROBERT R. RISSMAN,
257 South Spring Street, Los Angeles 12,
Attorneys for Appellants.

NANETTE DEMBITZ,
ARTHUR GARFIELD HAYS,
WILLIAM EGAN COLBY,
PETER H. KASKELL,
New York, N. Y.
Counsel, American Civil Liberties Union,
of Counsel.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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BRIEF FOR APPELLANTS.

Jurisdiction.

This is an appeal from a judgment of the District Court of the United States for the Southern District of California, Central Division, entered October 4, 1948, in which it granted appellees' motion to dismiss appellants' amended complaint [R. 47]. The District Court's opinion is printed at 80 Fed. Supp. 501 and R. 18-46.

The District Court had jurisdiction over the action under the terms of the Judicial Code, Section 24(12), as amended (28 U. S. C. 1343(1)) which provides for jurisdiction over suits for damages based on acts done in furtherance of any conspiracy mentioned in Section 47 of Title 8 of the United States Code; the instant action is a suit for damages based on such acts [see Complaint, R. 2-9]. The District Court also had jurisdiction under the

Judicial Code, Section 24(1), as amended (28 U. S. C. 1331), in that the cause of action arose under the Constitution and laws of the United States and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars [see Complaint, R. 2-9].

This Court has jurisdiction of this appeal under 28 U. S. C. 1291 and 1294(1).

Statute Involved.

This action was brought under that part of Section 2 of the Act of April 20, 1871 (c. 22, §2, 17 Stat. 13) which has become Section 47(3) of Title 8 of the United States Code (to be hereinafter termed Section 47(3)). It provides:

> §47. Conspiracy to interfere with civil rights
>
> * * * * * * * * *
>
> Depriving persons of rights or privileges
>
> (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election

of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Statement of the Case.

Proceedings.

The pleadings consist solely of appellants' amended complaint praying for damages under Section 47(3) [R. 2-9], and the appellees' motion to dismiss the complaint for failure to state a cause of action [R. 9-10]. The District Court granted such motion to dismiss [R. 47].

Allegations of the Complaint.

The facts as stated in the complaint, which are to be deemed admitted for the purposes of the motion to dismiss, are that the appellants, all of whom are citizens of the United States, are members of the Crescenta-Cañada Democratic Club (hereinafter called "the Club"), appellant Morse being its Chairman, and appellant Hardyman being Chairman of its Program and Publicity Committee [R. 2]. The Club, a voluntary association, was duly or-

ganized and chartered by the Los Angeles County Democratic Central Committee as an officially recognized Democratic Club. Its chief purposes were participation in the election of officials of the United States, including the President, Vice-President, and Members of Congress; petitioning the national government for the redress of grievances; and engaging in public meetings for the discussion of national public issues, including the international and foreign policies of the United States [R. 2-3].

In accordance with these purposes and with its customary practice of holding regular public meetings respecting national issues, the Club scheduled and arranged for a regular public meeting in the City of La Crescenta for the evening of November 14, 1947, at which the foreign policy of the United States, and in particular the Marshall Plan, was to be discussed by a speaker and by those attending the meeting. It was further scheduled that the officers of the Club would present a resolution opposing the Marshall Plan to such meeting for adoption; and such resolution, if adopted, would be forwarded to the President of the United States, the State Department, and the members of Congress, in order to petition for a redress of grievances with respect to the Marshall Plan [R. 4-5]. At previous meetings the Club had adopted such resolutions and so forwarded them to such officials [R. 4-5].

A few days prior to November 14, the appellees, knowing of the meeting scheduled by the appellants for that date, and of its program and purposes, conspired to interfere with and break up such meeting, and to prevent the

adoption and transmission of the proposed resolution [R. 5-6]. Appellees formed this conspiracy because they were opposed to the views of the Club's membership, including appellants, which had been previously expressed in resolutions respecting the Marshall Plan and which were again to be expressed at the November 14th meeting [R. 5-6]. In furtherance of such conspiracy the appellees went to the Club meeting of November 14th; by threatening to assault and in fact assaulting appellants, and by ordering those attending the meeting to leave, appellees forced the meeting to disperse without completion of the scheduled discussion of national affairs and without the adoption and transmission of the scheduled resolution [R. 7-8]. Appellees had not so conspired or interfered with numerous public meetings scheduled and held prior to November 14th with the knowledge of appellees, by organizations expressing views with which appellees agreed, at which resolutions were adopted respecting the foreign policies of the United States [R. 6].[1]

The appellants prayed for damages on the basis of the deprivation they suffered with respect to their constitutional rights, as well as their other injuries, and asked punitive damages because of the malicious nature of appellees' acts [R. 8].

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[1]The complaint also alleged that appellees disguised themselves by the unlawful and unauthorized wearing of American Legion caps [R. 7]. Upon this appeal, however, we accept the District Court's view that the wearing of such caps did not constitute a disguise within the meaning of 47(3) [R. 30-31].

Opinion of the Court Below.

The Court below appeared to recognize that Congress has the constitutional power to establish a civil right of action against private individuals who interfere with the constitutional privilege here involved: of assembling to petition Congress and discuss national affairs [R. 20, 21, 23]. Nevertheless, the lower Court held that Section 47(3) does not establish a cause of action for interference with this privilege unless the interference is committed by the State or a person acting for it [R. 34]; on this basis the Court concluded that the instant complaint failed to state a cause of action [R. 40-41]. In arriving at this construction of Section 47(3) the lower Court, despite its apparent recognition that the privilege here involved is guaranteed under the original Constitution absent the amendments, relied heavily upon decisions under the Fourteenth Amendment which held that the Federal Government is empowered to protect the rights assured thereunder only against State action [R. 23-26, 35-39]. The District Court also rested its construction on its belief that all previous civil and criminal civil rights actions had been against persons possessing State authority [R. 32].

Specification of Errors.

The District Court erred in dismissing the complaint for failure to state a cause of action, on the ground that Section 47(3) does not apply to private individuals such as appellees, and only applies to persons acting for the State.

Points to Be Argued and Summary of Argument.

I. The Complaint States a Cause of Action Under Section 47(3). The Lower Court Erred in Holding That Section 47(3) Is Inapplicable to Interferences by Private Individuals With the Privileges Here Involved.

A. The District Court erred by determining the scope of Section 47(3) on the basis of Supreme Court decisions dealing with the Fourteenth Amendment; for these decisions themselves recognize that civil rights other than those guaranteed by the Fourteenth Amendment may be directly protected by the Federal Government against interference by private individuals. The Fourteenth Amendment and doctrine concerning it is not relevant in the instant case because the privileges to petition Congress and to assemble to so petition and discuss national affairs are guaranteed by the original Constitution absent the Amendments.

B. The Supreme Court decisions dealing with the section of the civil rights legislation which is the criminal counterpart of 47(3) are of controlling authority with respect to its construction. They clearly demonstrate the validity of the instant cause of action. For the Supreme Court has repeatedly upheld the application of the criminal section to private individuals; further, the Court has emphatically asserted its applicability to interferences by private individuals with the very privilege here involved: the privilege of assembling to petition Congress and discuss national affairs. These decisions are controlling in

the instant case not only because they establish principles apposite to the construction of 47(3) and show the irrelevance of the cases utilized by the District Court, but also because 47(3) must be construed *in pari materia* with its criminal counterpart.

C. While we believe the language of 47(3) demonstrates the congressional intention to establish the instant cause of action, the legislative history unmistakably proves this intention in the event the language is deemed open to any other construction.

D. Because of the nature and extremely limited range of the privileges subject to protection by Section 47(3) under the construction here urged, there is no merit in the District Court's view that validation of the instant cause of action would result in a broad area for Federal redress against private individuals.

II. Section 47(3), Construed as Embracing the Cause of Action Stated in the Instant Complaint, Is Constitutional.

It seems to be conceded in the District Court opinion, and the Supreme Court opinions uncontrovertibly establish, that the cause of action stated in the instant complaint could constitutionally be established by Section 47(3).

ARGUMENT.

I.

The Complaint States a Cause of Action Under Section 47(3). The Lower Court Erred in Holding That Section 47(3) Is Inapplicable to Interferences by Private Individuals With the Privileges Here Involved.

A. Controlling Decisions by the United States Supreme Court Establish That the Complaint States a Cause of Action Under Section 47(3).

SUMMARY OF PRINCIPLES DETERMINED BY DECISIONS.

The gravamen of the instant complaint is that the appellees, a group of private individuals, conspired to deprive appellants of their equal privileges within the meaning of Section 47(3), by conspiring to prevent appellants from continuing a meeting called to petition Congress and discuss national affairs [R. 4-7].

The validity of this cause of action, as well as the lower Court's error in relying upon the Fourteenth Amendment and the cases thereunder, are clearly demonstrated by the Supreme Court's decisions with respect to the section of the civil rights statutes which is the criminal counterpart of Section 47(3).

While Section 47(3) has not itself been before the Supreme Court,[2] the Court has, contrary to the District

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[2] *O'Sullivan v. Felix,* 233 U. S. 318, involved an action against a private individual based on a deprivation of the right to vote; however, the validity of the cause of action under 47(3) was conceded and the opinions only involved the statute of limitations. (See Circuit Court opinion: 194 Fed. 88.)

Neither does there appear to be any Circuit Court opinion bearing on the instant question other than *Love v. Chandler,* 124 F. 2d 785

Court's statement [R. 32], repeatedly upheld the application of the criminal section, herein to be termed Section 241,[3] to acts of private individuals. For, under the original Constitution, absent the Amendments, the Federal Government is deemed to guarantee directly to the citizen the small group of rights and privileges which are vital to its existence as a Republic against all interference, including that by private individuals. It is these rights and privileges which, according to the Supreme Court's repeated statements, Section 241 protects; furthermore, the privileges involved in the instant cause of action are, according to the Supreme Court's unequivocal declarations, among this special and fundamental group of privileges. The Court's decisions as to Section 241 are, we submit, controlling herein not only because of the principles they establish, but also for the compelling reason that Sections 47(3) and 241 are *in pari materia*[4] and the former must therefore be given a similar construction to that accorded the latter by the Supreme Court.

(C. C. A. 8, 1942). There the right involved: to WPA employment, —was held not to be among those guaranteed by the Constitution. The Court also seems to have based its dismissal of the cause of action on the inapplicability of 47(3) to private individuals, though this part of the opinion does not seem necessary to the decision, both because of the holding as to the status of WPA employment and because of the actual official standing of the defendants.

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[3]The criminal section, at present codified as 18 U. S. C. 241, had its origin as Section 6 of the Act of May 31, 1870; it was incorporated in the Revised Statutes and the Criminal Code, and constituted Section 51 of Title 18 of the United States Code, prior to the present re-codification of Title 18. It will be referred to herein as Section 241 regardless of the time element.

[4]That Section 47(3) must be given the same construction as Section 241 is indubitable from the legislative history. According to the Chairman of the Select House Committee which drafted the

1. The Fourteenth Amendment Cases, on Which the District Court Relies, Have No Bearing on Federal Protection Against Private Individuals of the Type of Privilege Here Involved.

In the long line of cases dealing with Section 241, the Supreme Court has repeatedly emphasized the irrelevance of the Fourteenth Amendment, stating that the basic privileges of citizens with which 241 is concerned do "not depend upon any of the Amendments to the Constitution but arise(s) out of the creation and establishment by the Constitution itself of a national government."[5] Thus, as the Court stated in a Section 241 decision, in words applicable to the suit at bar: "Reference to cases under . . . the Fourteenth Amendment . . . can afford no aid in the present case."[6]

While the lower Court opinion adverts to the cases establishing that the privilege here involved is one of the

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statute from which 47(3) is derived, the section embodying 47(3) was identical in its legal grounds with 241, its purpose being merely to clarify Section 241 and render it less vague and general (Congressional Globe, 42nd Cong., 1st Sess. 1871, hereinafter cited as "Cong. Globe," Appendix pp. 68-69). And see the statement of another responsible spokesman: "The measure under consideration gives a civil remedy parallel to the penal provision." Cong. Globe, page 461. See also page 383.

Compare *Picking v. Pennsylvania R. Co.,* 151 F. 2d 240, 248-9 (C. A. 3rd, 1945), where the Court held that the civil rights sections relating to acts under color of State authority (8 U. S. C. 43 and 18 U. S. C. 242) are *in pari materia* and that the civil section must be given the construction theretofore given to the criminal section by the Supreme Court.

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[5]*In re Quarles and Butler,* 158 U. S. 532, 535. Practically identical language also appears in *Logan v. United States,* 144 U. S. 263, 293.

[6]*Ex parte Yarbrough,* 110 U. S. 651, 665-6.

few guaranteed under the original Constitution [R. 21],[7] its conclusion as to the meaning of Section 47(3) is based on a confusion between this special type of privilege and the broad class of rights which are merely within the protection of the Fourteenth Amendment, instead of the original Constitution, and which therefore are susceptible of protection by the Federal Government only against State action.

All of the doctrine cited by the District Court for its view that State authority is prerequisite for a cause of action under 47(3) relates exclusively to the due process and equal protection guarantees of the Fourteenth Amendment; the cited opinions themselves explicitly recognize that constitutional guarantees other than those of the Fourteenth Amendment apply to private acts.[8] Since, as we

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[7]These cases are discussed in detail, *infra,* pp. 17-20.

[8]Thus, in the *Civil Rights Cases,* 109 U. S. 3, upon which the District Court relies extensively [R. 23, 24-25, 42], the Court held unconstitutional a Federal statute penalizing private discrimination against Negroes, stating that the Fourteenth Amendment could not be construed to grant Federal power over individual acts or else Congress could enforce "all rights of life, liberty, and property." At the same time, however, the Court recognized that this Amendment posed a peculiar problem, and that in other respects, as in the instance of the civil rights protected by the Thirteenth Amendment, Congress could regulate "the conduct and transactions of individuals."

Similarly, the matter quoted from the *Harris* case [R. 42, note 15] relates solely to the distinct question of the scope of the Fourteenth Amendment, the Court conceding that the Thirteenth Amendment, for example, afforded direct protection by the Federal Government to private individuals (106 U. S. at p. 639). In *Shelley v. Kraemer* [R. 35-36, 38], the only possible source for Federal protection of the right there involved was the Fourteenth Amendment, and the entire opinion is therefore concerned with it.

The Eighth Circuit Court's opinion in *Love v. Chandler* [R. 22-23, 34-35] is, we submit, based on erroneous interpretations and applications of Supreme Court opinions, similar to the District Court's herein.

shall show in detail below (pp. 17-20), the privilege here in issue is in the category of those rights that are directly guaranteed by the Constitution against interference by private individuals, the principles and decisions with respect to the Fourteenth Amendment are entirely irrelevant to the question of the applicability of Section 47(3) to interferences by private individuals with this privilege.[9]

2. The Controlling Supreme Court Decisions Establish the Applicability of Section 47(3) to Acts of Private Individuals.

The Supreme Court has repeatedly upheld the application of Section 241 to acts of private individuals, explicitly rejecting such reasoning as the lower Court's with respect to the exclusive jurisdiction of the State courts over all such acts. With no doubt at any time that Section 241 was intended to apply to private individuals, the Court's only concern in these cases has been as to whether the right with which the individual interfered was included in the narrow category of those deemed to be of national character. The underlying principle of these decisions is that the Federal Government has implied constitutional power, arising from the very fact of its establishment and necessary to its "independence and supremacy,"[10] to furnish direct protection, independent of the states, to intrinsically national rights.

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[9]And the assumption that the civil rights statutes were enacted to enforce the Thirteenth and Fourteenth Amendments [R. 22] not only is undermined by the Supreme Court's decisions on Section 241, but, so far at least as Section 47(3) is concerned, is shown to be factually inaccurate by that section's legislative history (see *infra*, pp. 23-26).

[10]*In re Quarles and Butler,* 158 U. S. 532, 537.

Thus, in the earliest and leading case, *United States v. Cruikshank,* 92 U. S. 542 (1876), the Court concluded that the general right of assembly which was there attacked by private individuals was not related exclusively to Federal functions and therefore could not be protected against private individuals by the Federal Government; the Court stated emphatically, however, that if "the object of the defendants [had been] to prevent a meeting" for the purpose of "consultation in respect to public affairs and to petition for a redress of grievances," "the case would have been within the statute" (at pp. 552-553). The *Cruikshank* doctrine as to Section 241's application to interferences by private individuals with rights of a national character was followed in the *Yarbrough* decision,[10a] where the Court held that the right to vote at a congressional election was subject to direct protection by the Federal Government against private individuals. And see the *Classic* case, for an assertion of the *Yarbrough* holding in the present decade.[11]

Indeed, with respect to a variety of rights the Court has reiterated the doctrine that interferences by private individuals with rights and privileges vital to the functioning of the Federal Government are covered by Section 241, holding the section inapplicable only when the affected right was not in this category.[12] Thus, in *Logan v. United*

[10a]*Ex parte Yarbrough,* 110 U. S. 651.

[11]In *United States v. Classic,* 313 U. S. 299 (1941), the Court stated that the right to choose members of Congress "is secured against the action of individuals as well as of States" (at p. 315). However, the defendants were in fact State election officials and the action was brought under 18 U. S. C. 242, which applies to deprivations by persons acting under color of State authority, as well as Section 241. (*Semble: United States v. Mosley,* 238 U. S. 383.)

[12]As in *United States v. Wheeler,* 254 U. S. 281. And see *Hodges v. United States,* 203 U. S. 1.

States, 144 U. S. 263, a judgment of conviction under Section 241 was affirmed against private individuals who had attacked persons in the custody of a Federal marshal, thus depriving the latter of the right to be free from violence while in such custody. The Court answered the argument that the attackers could be prosecuted under State law, by stating that the right affected was not "a right which can be vindicated only under the laws of the several states" (at p. 282) and that this right could "be affirmatively enforced . . . against individuals" by the Federal Government (at p. 293). To the same effect, affirming convictions for interferences with similar rights: *In re Quarles and Butler,* 158 U. S. 532 (see especially p. 537), and *Motes v. United States,* 178 U. S. 458. And in *United States v. Waddell,* 112 U. S. 76, the Court held that Section 241 was validly applied to a private individual who deprived another person of the right under a Federal statute to perfect his claim to a homestead. Similarly, this Court, on the basis of *Waddell* and others of the above-discussed decisions, expressed no doubt as to the applicability of Section 241 to private individuals, and upheld the conviction of a private individual for depriving another person of the right of testifying in a land contest before a Federal official.[13]

The District Court denied to these decisions the controlling effect which must be accorded to them in determin-

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[13] *Foss v. United States,* 266 Fed. 881 (1920). It is to be noted that this Court in the *Foss* case considered the *Sanges* decision, cited by the lower court [R. 45, note 31], to be erroneous (266 Fed. at 883).

In *Mitchell v. Greenough,* 100 F. 2d 184 (1938), which is cited by the District Court [R. 41] and which appears to be the only other decision of this Court of possible relevance, there was no occasion to consider the applicability of the statute to private individuals, the defendants clearly being State agents.

ing the applicability of Section 47(3) to acts of private individuals. To some of these cases it gives no attention;[14] and others it explains on grounds which the Supreme Court has itself rejected, or on the basis of facts lurking in the record to which the Court did not advert.[15] Whatever the justifiability of disregarding a unique Supreme Court opinion on such bases, such an approach is hardly permissible where there is, as here, a consistent line of holdings and detailed articulations of their doctrinal foundation.

We submit that the Supreme Court decisions uncontrovertibly establish the applicability of Section 241 to interferences by private individuals with rights that are deemed primarily Federal and are directly guaranteed by the Federal Government under the original Constitution. These decisions thus contradict the District Court's theories that Federal protection of civil rights is and should be uniformly restricted to protection against State action, and that the civil rights statutes have not been applied to private individuals. On the contrary, not only do the Su-

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[14]Such as the *Cruikshank, Waddell, Motes* and *Foss* cases, all discussed *supra.*

[15]Thus, while it is true as a factual matter that the victim of the defendant's act in the *Yarbrough* case was a Negro [R. 32, 45 at note 33], the *Yarbrough* holding and doctrine was based on the right of all citizens, regardless of race, to vote for Congressmen; and in the *Classic* case the Court pointed out that race was irrelevant in the establishment of a civil rights act offense unless it was expressly made an element by statute. (313 U. S. at 327.) To the same effect, see *Screws v. United States,* 325 U. S. 91, at 98-99. And compare *United States v. Mosley,* 238 U. S. 383, at 387.

In the *Logan case* [R. 32 at note 34] it is true that the lengthy Statement of Facts by the Reporter mentions in passing that the defendants were in league with the prisoners' guards, but the Court in no way adverted to this fact. As to the *Quarles* case [R. 32 at note 31] we are unable to discern in the report of the case the connection of the defendants with a public body.

preme Court's decisions on Section 241 countenance the construction of 47(3) which we here urge, but these decisions indeed dictate that 47(3) should be applied to private individuals because 47(3) must be given a similar construction to that of Section 241 (see note 4 *supra*).

3. The Controlling Supreme Court Decisions Establish That the Privilege Here Involved Is Protected by Section 47(3).

The Supreme Court decisions relating to Section 241 not only uphold its application to private individuals, but also uphold its application to interference with the specific privilege involved in the instant action: of assembling to petition Congress and discuss national affairs. For it is an essential characteristic of citizenship in a republican government, and essential to the government's continued existence as republican, that citizens have the right to formulate and express their views on national issues, without obstruction such as occurred in the case at bar. Accordingly, the privilege here in issue is one of the small group of privileges deemed to be primarily Federal which Congress may protect directly against private individuals.

In the words of the Supreme Court:

> "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If . . . the object of the defendants was to pre-

vent a meeting for such a purpose, the case would have been within the statute [Section 241]." (*United States v. Cruikshank,* 92 U. S. at p. 552).

Semble: In re Quarles and Butler, 158 U. S. 532, 535.[16]

In addition to the Court's explicit statements as to the status of this privilege, all the Court's analyses of the scope of the Federal civil rights that are directly protected by the Constitution, and thus by Section 241, unmistakably indicate its inclusion among them. For whether the criterion of such rights be formulated in the terms laid down in the *Cruikshank* case; or in terms of the "rights . . . essential to the healthy organization of the government itself";[17] or in terms of the rights which "arise(s) out of the creation and establishment by the Constitution itself

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[16]Compare *Hague v. C.I.O.,* 307 U. S. 496, 512: "Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation . . ." (Opinion of Justices Roberts and Black, in which Chief Justice Hughes and Justice Stone concurred in this respect).

In there ruling upon the privileges and immunities protected by the Fourteenth Amendment, these Justices said "it is clear that the right peaceably to assemble and to discuss these topics ["matters growing out of national legislation"] and to communicate respecting them . . . is a privilege inherent in citizenship of the United States which the Amendment protects . . . No expression of a contrary view has ever been voiced by this court" (at 512-513). See also *Slaughter-House Cases,* 16 Wall. 36. It would seem, though it is not necessary to decide in the instant case because of the Supreme Court's express inclusion of this privilege among those guaranteed directly to citizens under the original Constitution, that if a privilege is deemed secured to citizens against State abridgement under the Fourteenth Amendment, it should, by the same token, be deemed guaranteed directly to citizens under the original Constitution. Compare *Exparte Virginia,* 100 U. S. 339, 345. It is to be noted that the privileges of citizenship protected by the Fourteenth Amendment, as well as those protected by the original Constitution, are extremely limited in number (see *infra,* note 35).

[17]*Yarbrough,* 110 U. S .at 666.

of a national government" and which are necessary to its "independence and supremacy";[18] or in terms of those rights which are the "correlatives" to the rights of the Government[19]—whatever test be used, it is clear that the privilege of assembling to petition Congress and discuss national affairs must be deemed a fundamental privilege directly guaranteed to United States citizens under the Constitution by the Federal Government.[20]

Accordingly, since Section 47(3) is to be given a similar construction to Section 241 (see *supra,* note 4), the appellees' conspiracy to deprive appellants of this privilege states a cause of action within Section 47(3). Further-

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[18]*Quarles,* 158 U. S. at 537; *Logan,* 144 U. S. at 293.

[19]*Crandall v. Nevada,* 6 Wall. 35, 44. The Court particularly stressed as such correlative rights "the right to come to the seat of government to assert any claim he may have upon that government or to transact any business he may have with it, to secure its protection, to share its offices, to engage in administering its functions."

[20]The rationale as to Federal protection of this privilege was well set forth in *Powe v. United States,* 109 F. 2d 147 (C. A. 5, 1947), where the Court held that no offense under Section 241 had been committed because the only right there affected was the right to discuss matters of local concern. As to the privilege of discussing national affairs, however, it stated (at p. 151):

> "We do not doubt that Congress may directly protect its citizens in their right to assemble peaceably and petition the federal government for redress, just as it may protect persons from unlawful violence while in federal custody, under what are called the implied powers of Congress. * * * But in the cases supposed Congress would interfere directly only because of the necessity to maintain a federal right in its integrity. Because the federal government is a republican one in which the will of the people ought to prevail, and because that will ought to be expressive of an informed public opinion, the freedom of speaking and printing on subjects relating to that government, its elections, its laws, its operations and its officers is vital to it."

more, aside from this principle of construction, the Supreme Court's decisions on Section 241 support our conclusion as to the validity of the instant cause of action. For they establish that the privilege described in the complaint is a privilege guaranteed by the Constitution against interference by private individuals; and the legislative history uncontrovertibly establishes,—what would in any event hardly be doubted—that the statutory phrase "privileges and immunities under the laws" refers to the privileges so guaranteed by the Constitution (see *infra,* note 30).

4. Summary of Section 241 Cases.

In sum, the Section 241 cases establish (1) the District Court's error in assuming that there is any general principle dictating that the protection of civil rights is a State function and that Federal protection only applies to persons acting with State authority; (2) on the contrary, there is a class of civil rights and privileges that may be directly protected by the Federal Government against the acts of private individuals, and Section 241 affords such direct protection for these rights and privileges; and (3) the privilege on which the present cause of action is based is in this category of rights and its protection against private individuals is within Section 241. The principles established in the Section 241 cases thus demonstrate the validity of the instant cause of action; furthermore Section 47(3) must be construed to embrace this cause because it must be given a similar construction to that of Section 241.

B. The Language and Legislative History of Section 47(3) Establish That the Instant Complaint States a Valid Cause of Action Thereunder.

We believe that the language of Section 47(3) unmistakably shows the congressional intent to establish a cause of action against individuals acting in a private capacity. But if indeed, the language is deemed ambiguous, the legislative history of the section, which is conclusive in the resolution of any statutory ambiguity,[21] confirms beyond peradventure of doubt, that Congress intended 47(3) to apply to individuals acting in a wholly private capacity, and further, that the "privileges" which Congress contemplated include those here involved.

1. Language of 47(3).

The language of Section 47(3): a civil action may be brought "if two or more persons in any State or Territory" commit specified acts,—stands in clear contrast to the section which directly preceded it in the original enactment (now codified as 8 U. S. C. 43): a civil action may be brought against "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" commits similar acts. It is hardly conceivable that Congress shifted from the "under color of" language of Section 43 to the "two or more persons" language of 47(3) with the intention, nevertheless,

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[21]See the emphasis on the statutory purpose as revealed by the legislative history, in construction of the criminal sections of the civil rights acts, in *United States v. Classic,* 313 U. S. 299, at 327; *Screws v. United States,* 325 U. S. 91, 98, 99 at note 7. For a recent example of an unusual degree of reliance on statutory purpose as shown by the legislative history, see *Lawson v. Suwanee Fruit and Steamship Co.,* 93 L. Ed. (Adv. Op.) 470, decided by the United States Supreme Court February 14, 1949, where, because of the statutory purpose, the Court interpreted a term contrary to the definition thereof provided in the statute.

of carrying over the "under color of" limitation to the latter section.

Not only does the District Court's ruling thus ignore the principle that a change of phraseology in a statute shows an intention to convey a difference in meaning, but it also ignores the converse principle that a phrase is assumed to be used in the same sense throughout. In Section 47(3), the clause under which the instant action is brought—"If two or more persons in any State or Territory conspire . . . for the purpose of depriving . . . any person . . . of equal privileges and immunities," —is directly followed by the clause "or for the purpose of preventing or hindering the constituted authorities of any State or Territory from" engaging in certain functions. Assuming that it might be possible, as the District Court held, to interpret "persons" in the clause here involved to mean persons acting for the State, the fact that this construction was not intended is clearly established by considering "persons" in connection with the succeeding clause; under the District Court's construction the latter clause would be operative only in the improbable circumstance that the State's "constituted authorities" were hindered in their functions by other State agents.

Thus, it is sufficiently clear from the language of 47(3) that it applies to deprivations by private individuals, so that, as was held respecting Section 241, there is no reason "to deprive citizens of the United States of the general protection which on its face [the] section . . . most reasonably affords."[22]

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[22]*United States v. Mosley,* 238 U. S. 383, 388. And see *Bomar v. Keyes,* 162 F. 2d 136 (1947), where the Court of Appeals for the Second Circuit, confronted with a case of first impression under 8 U. S. C. 43 (the "under color of" civil section), held that it must be given the application its language indicated.

2. Legislative History of 47(3).

The legislative history of Section 47(3), unlike the "meager history" of 241 on which the Supreme Court relied, for want of better, in the *Classic* case (*loc. cit. supra,* note 21), is copious[23] and fully exposes the purposes of the Congress. It was uniformly asserted throughout the congressional debates and at no time doubted, that the chief purpose of Section 2 of the so-called Ku Klux Act[24] from which 47(3) is derived, was to provide redress against the Klansmen for their actions as private individuals;[25] while this was the major stimulus for the enactment, Congress also contemplated the application of the section to any individual committing the specified acts.[26]

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[23]The debates cover approximately 500 pages of the Congressional Globe.

[24]The Act of April 20, 1871, C. 22, 17 Stat. 13, the first section of which has become 8 U. S. C. 43, and the second section 8 U. S. C. 47(2) and 47(3), is generally so called. See *Screws v. United States,* 325 U. S. 91 at 99.

[25]It is indisputably clear from the congressional descriptions and discussions of the Ku Klux that the Klansmen were deemed to be acting only as private individuals. (*Cong. Globe,* pp. 320-321, 336-7, 339, 357, 394, 601-607.)

[26]As a matter of statutory construction, the section would in any event be so applied. While the legislative purpose shows the connotation to be ascribed to the statutory terms, the application of the statute is not, of course, limited to the specific offense Congress had before it.

Thus, in *United States v. Mosley,* 238 U. S. 383, in which the Court by Mr. Justice Holmes construed Section 241, it pointed out that "The source of this section in the doings of the Ku Klux and the like is obvious . . . [But the] section . . . had a general scope and used general words that have become the most important now that the Ku Klux has passed away." Similarly, in *United States v. Classic,* 313 U. S. 299, 314, the Court said: "It is no extension of the criminal statute . . . to find a violation of it in a new method of interference with the right which its words protect."

In the debates both the proponents and opponents of the Act at all times recognized its application to private individuals. Thus, the major points of attack by the Act's opponents were its alleged unconstitutionality because of its application to private individuals rather than merely to State agents, and its alleged supersession of State law with respect to the offenses of all private individuals;[27] spokesmen for the statute, at all times conceding that it applied to private individuals, urged that it was nevertheless constitutional because of the power of Congress under the original Constitution directly to protect the rights of citizens and that it was concerned with individual crimes only insofar as they affected Federal rights.[28]

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[27]Cong. Globe, pp. 337-338, 351-353, 357, 361, 366, 376-7, 385, 396, 416, 419, 420, 429-430, 455, Appendix p. 215.

[28]Cong. Globe, pp. 382, 478, and Appendix p. 69 (Speeches by Representative Shellabarger, Chairman of Select House Committee which drafted the statute); pp. 475-476 (speech of Representative Dawes, a member of the Committee); pp. 332, 382-3 (Representative Hawley), 485, 580, Appendix, p. 229.

While the more authoritative congressional view was that the statute was enacted under the original Constitution, some reference was made to the Fourteenth Amendment as a source for the legislation (Cong. Globe, pp. 367, 461, 481, 575-6, 607, 692-3). Some Congressmen regarded the statute as an implementation of the Amendment merely in the sense that the Amendment declared the paramountcy of national citizenship (see *Selective Draft Law Cases,* 245 U. S. 366, 388-9) and extended the rights of citizenship, which the statute was to protect, to all races. But even the view of those Congressmen who regarded the enactment as an exercise of the powers conferred by the Fourteenth Amendment is no indication of a view that the statute was inapplicable to private individuals, for the Amendment was originally regarded as giving Congress power to protect against private action. See Carr, *Federal Protection of Civil Rights* (1947), p. 36; Flack, *The Adoption of the Fourteenth Amendment* (1908), p. 235; *Constitutional Basis for Federal Anti-Lynching Legislation,* 6 Lawyers Guild Review (1946), pp. 643, 645.

While some Congressmen emphasized one or another of the rights of citizens which would be protected by 47(3) including the right of assembly,[29] the dominant intent was to protect without particularization "the American citizen . . . in the enjoyment of [whatever] rights, privileges and immunities [are] secured to him under the Constitution" and whatever "privileges and immunities which are in their nature 'fundamental' . . . elements of citizenship."[30] Thus, there can be no doubt that redress for deprivation of the privilege involved in the instant cause of action, which has been repeatedly stated to be a fundamental privilege of citizenship (*supra,* pp. 17-20), is within the legislative intent.

Finally, the legislative history makes clear that the instant action is the very type with which Congress was deeply concerned. For the responsible spokesmen for the statute regarded it as vital to the well-being of the Republic

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[29]Cong. Globe, p. 382 (Rep. Hawley). And interference with political meetings was specifically mentioned as one of the then current abuses by the Ku Klux (Cong. Globe, p. 444).

[30]Cong. Globe, p. 475 (Committee member Dawes); Appendix p. 69 (Chairman Shellabarger). Statements to same effect: pp. 382 (Shellabarger) 694 (Senator Edmunds, Chairman of Judiciary Committee who steered the bill through the Senate), 341, 429, 485, 568, 607.

The legislative history thus proves beyond doubt that the phrase "privileges and immunities under the laws" includes privileges and immunities under the Constitution. Such inclusion would in any event be assumed since the Constitution is customarily referred to as part of the laws of the United States. (*I. e.,* see such reference in Art. VI, Sec. 2 of the Constitution.)

that protection be thereby afforded to everyone who "by reason of popular sentiment . . . cannot obtain the rights and privileges due an American citizen."[31]

The District Court's Erroneous Explanation of the Term "Equal."

So far as the District Court adverts to the terms of 47(3), its construction is largely based on its interpretation of the one word "equal" [R. 24-25]. Even if its view of the implications of this term were well-founded, which we submit it is not,[32] it would not be justifiable because of one word to ignore all the other indications, both in language and history, that 47(3) was to apply to acts

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[31]Cong. Globe, p. 429.

Such protection was to be afforded whatever the root of the prejudicial "sentiment." Senator Edmunds explained "we do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another . . . but if . . . it should appear that this conspiracy was formed against this man because he was a Democrat . . . or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it." (Cong. Globe, p. 567.)

[32]The District Judge's statement that one could only be deprived of "equal" privileges and immunities by the State seems completely circular reasoning because the implication of "equal" depends on the scope of the "privileges." For a "privilege" is "the freedom to assert a legal right or a legal power" (*Bomar v. Keyes,* 162 F. 2d 136, 139 (C. A. 2d, 1947)); and whether it is the State or a private individual that is capable of depriving a citizen of his "equal" privilege depends on whether he is guaranteed to be equally free as other citizens only from interference by the State or from interference by other individuals as well. If the latter, then he is deprived of "equal" privileges by private individual action in the same way as private action by one riparian user deprives another of the "equal" privilege of using water.

Whether "equal protection of the laws," as to which there is no established guarantee to the citizen by the Federal Government against private acts, has the connotation of State action, is not here in issue.

of private individuals.[33] But in any event, the statutory history makes it clear that the word "equal" was inserted only to signify that in order to fall within the section the conspiracy must seek to affect a citizen's enjoyment of such privileges as are being enjoyed by other citizens.[34]

Thus, appellees' conspiracy to prevent appellant-citizens from enjoying the privilege of assembling to petition Congress and discuss national affairs, which was being enjoyed without such interference by their fellow-citizens, is squarely within the intent of the statute. The statute was to prevent any private individuals such as appellees from arrogating to themselves the power to govern whether or not citizens shall enjoy the privileges guaranteed to them by the Federal Government under the Constitution.

C. Construction of Section 47(3) as Embracing the Instant Cause of Action Is Entirely Consistent With Established Principles of Federal-State Relations.

There is no foundation for the District Court's apprehension that construction of Section 47(3) as establishing the instant cause of action would result in a broad Federal

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[33]See *United States v. Gaskin,* 320 U. S. 527, in which the Supreme Court reversed a District Court judgment sustaining a demurrer to an indictment under The Peonage Abolition Act. The Supreme Court refused to follow the literal reading of the Act which limited its scope and which had been adopted by the District Court. The Court held that "the compactness of phrasing and the lack of strict grammatical construction does not obscure the intent of the Act." (320 U. S. at 529.)

[34]The insertion of the word "equal" was the result of an amendment the purpose of which, according to Chairman Shellabarger, was "to confine the authority of this law to . . . deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section." (Cong. Globe, p. 478.)

right of redress against private individuals [R. 38]. For the privileges and immunities subject to direct congressional protection and thus covered by Section 47(3) under the construction here urged, are extremely few in number.[35]

Furthermore, the circumstances that these privileges directly and vitally concern the functioning of the Federal Government and that the problem of protecting them from interference is nationwide, render Federal redress far more appropriate and effective when such privileges are attacked than resort to diverse State remedies. Obviously, for example, a State action against appellees for trespass or assault [see R. 33-34], would not tend to serve as an assertion of appellants' right to assemble to petition Congress and discuss national affairs, or as a nationwide deterrent to interferences with such rights, as does an action like the instant one which is directed specifically at the vindication of those rights. And such a vindication is not of importance solely to the plaintiff, as in the case of a State civil action; the Federal right of action was established by Congress not only for the sake of the deprived citizen but also for the sake of the "healthy organization of the government itself."[36]

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[35]See *United States v. Wheeler,* 254 U. S. 281. And even if the privileges of citizenship guaranteed by the original Constitution are deemed to be the same as those protected by the Fourteenth Amendment (see *supra,* note 16), their range is not expanded. See *Colgate v. Harvey,* 296 U. S. 404, and *James Stewart & Co. v. Sadrakula,* 309 U. S. 94. Thus, there is no pertinence in the instant case of the view voiced in the Fourteenth Amendment cases that the guarantee of protection to life, liberty and property must be construed as a guarantee only against State action or else Federal power would extend over all personal and property rights. See Fourteenth Amendment cases, *supra,* note 8; opinion of Justice Stone in *Hague v. C.I.O.,* 307 U. S. at 520; *Snowden v. Hughes,* 312 U. S. 1, 12.

[36]*Yarbrough case, loc. cit. supra,* note 17.

Accordingly, the fact that the acts alleged in the instant complaint constitute bases for State criminal or civil actions [R. 33-34], does not detract either from the validity or importance of the instant action. Congress, recognizing that there would be such a concurrence of jurisdiction, was concerned with establishment of a means for vindication of Federal rights of citizenship, without dependence upon whether or to what extent relief was provided by State law (see legislative history, *supra,* pp. 23-24). Thus, in the instant case, appellants are not concerned with personal or property injuries for which they could recover in State suits; the significance to appellants of appellees' acts and the major ground of their prayer for damages is the deprivation which they suffered in their rights as United States citizens.

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Thus, we submit that the requirements for a cause of action, as set forth in Section 47(3), are fully met by the allegations of the complaint. The elements of a cause of action, according to Section 47(3), are, at the outset, that "two or more persons in any State . . . conspire . . . for the purpose of depriving . . . any person . . . of equal privileges . . . under the laws." Here appellees within the State of California conspired to deprive appellants of their privilege under the Constitution, which was being enjoyed by other citizens, to assemble to petition Congress and to discuss national affairs. 47(3) further prescribes that "in . . . case of [such] conspiracy . . . if one or more persons engaged therein do . . . any act in furtherance of the object of such conspiracy, whereby another is injured in his person . . . or deprived of having and exercising any . . . privilege of a citizen of the United States, the party so injured or deprived may have an

action for the recovery of damages, occasioned by such injury or deprivation, against one or more of the conspirators." Here, in furtherance of the object of their conspiracy against appellants, appellees intimidated and shoved appellants, thus injuring them in their person, and broke up their assembly, thus depriving them of having and exercising their privileges as citizens of the United States. Appellants therefore "have an action for the recovery of damages" for such injury and deprivations.[37]

It is incumbent upon this Court to enforce whatever rights of action are within the protection Section 47(3) reasonably affords. (*United States v. Mosley,* 238 U. S. 383, 388.) And, as the Supreme Court pointed out in the *Screws* case, it is of especial importance that full effect be given to the sections of the civil rights acts now extant, for Congress has kept them alive for more than half a century, despite repeal of the numerous other sections of the original civil rights legislation. See *Screws v. United States,* 325 U. S. at page 100. Like the criminal section involved in the *Screws* case, Section 47(3) should "be allowed to serve its great purpose—the protection of the individual in his civil liberties" (325 U. S. at p. 98). And in the preservation of civil liberties, the civil suit against private individuals is perhaps of greater significance than the criminal sanction, particularly in times of controversy and stress.[38]

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[37]The District Court's insertion into the statute of the requirement that there be a series of deprivations [R. 33] is entirely unwarranted; it has no support in the language or history of the statute, in the Section 241 cases, or in general doctrine. Even with respect to "equal protection of the laws," there may be a denial "though it is neither systematic or long-continued" (*Snowden v. Hughes,* 321 U. S. 1, 9-10).

[38]See Carr, *Federal Protection of Civil Rights* (1947), pp. 14, 60, 148-9; *"To Secure These Rights,"* Report of President's Committee on Civil Rights (1947), pp. 117-118.

II.

Section 47(3), Construed as Embracing the Cause of Action Stated in the Instant Complaint, Is Constitutional.

It seems to be conceded in the District Court opinion that the cause of action stated in the instant complaint could constitutionally be established by Section 47(3) [R. 23-24]. That 47(3) is constitutional if construed as embracing the appellants' cause of action is too clearly established by the Supreme Court opinions to require argument. *United States v. Cruikshank; In re Quarles and Butler;* and see *Ex parte Yarbrough; Logan v. United States; Powe v. United States,* all *loc. cit. supra,* pp. 12-19. If, as declared in the cited cases, Congress can protect through imposing a criminal penalty such privileges as that of assembling to petition Congress and discuss national affairs, there can be no doubt that it can by Section 47(3), afford a civil remedy for their defense.

Conclusion.

The judgment of the District Court should be reversed and the District Court directed to deny appellees' motion to dismiss the complaint.

Respectfully submitted,

A. L. Wirin,
Fred Okrand,
Robert R. Rissman,
Attorneys for Appellants.

Nanette Dembitz,
Arthur Garfield Hays,
William Egan Colby,
Peter H. Kaskell,
Counsel, American Civil Liberties Union, of Counsel.